IN THE CORPORATION COURT OF THE CITY OF WINCHESTER, VA.

EX PARTE R. M. HENRY.

1. **Habeas Corpus.**—A writ of habeas corpus will lie to relieve a citizen from arrest when the charge preferred against him arises under an unconstitutional or invalid statute.

2. **Intoxicating Liquors—Constitutional Law.**—Section 23½ of the Byrd Liquor Law, prohibiting and regulating the manufacture and sale of "malt beverage," held unconstitutional on the ground that it is oppressive and unreasonable.

STATEMENT OF CASE.

R. M. Henry was arrested on a warrant charging him with selling two bottles of Malt Beverage contrary to the provisions of § 23½ of the Byrd Liquor Law. He was convicted and the minimum fine of $500.00 was imposed upon him. He appealed to the Corporation Court of the City of Winchester and was by it committed to the custody of the Sergeant of the said city. He then applied to this Court on the 21st day of September, 1908, for a writ of Habeas Corpus. The writ was issued and the Sergeant of the city made return to the Court disclosing the above Commitment of the Corporation Court as the cause of his detention.

Opinion of HARRISON, J.

THE JURISDICTION OF THIS COURT.

The first objection raised by the Commonwealth is to the jurisdiction of this Court over a person detained by the order of a Court of competent and co-ordinate jurisdiction. I may say that ordinarily I decline to take jurisdiction over matters, which are being investigated by a Court thoroughly capable of disposing of the matter, even though the party may under the law be justified in invoking the jurisdiction of the Court. But in this instance the statute which is assailed is of public interest throughout the Circuit over whose Courts I preside. Any ruling, therefore, taken by myself in regard to this Statute would naturally and necessarily have a significant bearing upon the administration of the law in the Circuit. The Statute, § 3029, makes it the mandatory duty of any Circuit Judge, having probable cause to believe that a person applying for the writ is illegally detained, to issue the writ. I have never been called upon to make a judicial ruling upon this section and refusal to issue the writ on my part might well be accepted in the Circuit as a ruling, that there was no probable cause to believe that petitioner was illegally de-

tained, and that therefore the statute under which he was prosecuted was a valid one. No mischief or delay can result from these proceedings. It is a matter of great interest to both Judge Atkinson and myself, that the validity of the statute involved in this case should be passed upon by the Supreme Court of this State at as early a date as possible. The Commonwealth and petitioner have each the right of appeal and this proceeding is the speediest route to that high and able Court. Now as to the legal right of petitioner to the Habeas Corpus. Every Court no matter whether of co-ordinate or subordinate jurisdiction, when acting within the limits of law, has the right to act according to its own conclusions, and its judgments, no matter how erroneous, cannot be even inquired into by any other Court, no matter how much superior in rank the Court may be, except by regular course of Appeal. Such was the case of Ex parte Marx, 86 Va. 40, 9 S. E. 475, in which the Supreme Court of Appeals was asked to review a judgment of the justice of the peace on a writ of Habeas Corpus. The Court refused to do so and held the judgment of the justice as conclusive and binding upon it as upon every other Court in the land. On the other hand no Court has the right to exceed the constitutional restrictions upon its authority, and when it exceeds such limitations, its judgments are void, and this is equally true of all Courts. No Court has a right to deprive a citizen of his liberty except upon a charge duly and formally preferred. A citizen cannot be deprived of his liberty upon the simple and general commitment of a Court, but that commitment must be based upon the charge of violating the law. A void statute can create no offence. The statute creating the offence being void, cannot authorize the punishment of a citizen for its violation. It is for this reason that a Habeas Corpus will issue to relieve a citizen from custody charged with the violation of an unconstitutional law. In some states it is held that a writ of Habeas Corpus is the writ of the highest privilege, and will not lie when the petitioner has another adequate remedy. Holding on appeal an adequate remedy, such Courts hold a Habeas Corpus cannot be used to test the constitutionality of a law. But this view contravenes a number of the decisions of the Supreme Court of the United States, and of the Supreme Court of Appeals of this State.

In Ex parte Meredith, 33 Gratt. 119, a statute prescribed that a Judge elected to fill a vacancy should be elected for the unexpired term. The constitution prescribed, that all judges should be elected for the full term. A Judge, who had been elected in accordance with the statute, arrested for contempt a Judge, who claimed under the constitution. Upon a writ of Habeas Corpus the statute was declared unconstitutional. In Ex parte Rollins,

80 Va. 314, the direct question was presented to the Court, and even after conviction a prisoner was released in Habeas Corpus because the statute was declared unconstitutional. Browns *v.* Epps, 91 Va. 726, 21 S. E. 119, and in Lacey *v.* Palmer, 93 Va. 159, 24 S. E. 930, were cases in which the Habeas Corpus was used to test the constitutionality of a law. It is true that in each of these cases the validity of the statute was sustained, but the opinion in each was an elaborate discussion of the constitutional question and the judgment of the Court a decision of the question. Had not the Habeas Corpus directly involved the constitutional question, the writ would naturally have been dismissed as not the proper remedy, even though the statute was unconstitutional. In the face of these precedents it does not seem to me any longer an open question in Virginia, that a writ of Habeas Corpus will lie to relieve a citizen from arrest when the charge preferred against him is under an unconstitutional or invalid statute. There can be no question as to the dignity of the Court. A Corporation and a Circuit Court have like powers in this respect.

SECTION 23½ OF THE BYRD LAW.

The history of this section of this act, its very enumeration shows, that it formed no part of the original Byrd law. It was placed in the bill by amendment, and, as I think it is demonstrable without harmonizing the Bill in its integrity with the amendment, or making the amendment harmonize with the other provisions of the bill. It can be taken out of the act without any degree affecting the act as a whole, which I consider taken as a whole is one of the best regulations of the liquor traffic this state has ever had. Experience will point out probably minor defects requiring legislative correction, but the general underlying principles are so sound, that I do not believe the people of this state will ever consent to any radical departure from them. If I thought that the section under consideration furthered the purposes of the Act in particular, the discussion would end at this point so far as this Court is concerned. But whatever object was had in view by this amendment, according to my conception of the section, must from the way it is framed, fail, and, if the section is stricken from the Act, the act will remain in its full integrity and unimpaired usefulness. I feel therefore perfectly free to consider this section unhampered by any fear that the result of the consideration will in fact impair the effect of the act as a whole.

GENERAL OBSERVATION OF THE WHOLE SECTION.

The first thing that holds the attention upon reading this section is that it provides or regulates the sale of a specified article

of food or commerce. It does not permit the sale provided it contains certain constituent elements. The distinction is of the utmost importance in general and gains in importance particularly as to this article because of the relation this section bears to the whole bill. There can be no question that this is the scope of this section.

First, it defines Malt Beverage.

Second, it limits the right to manufacture and sell the same to a few people.

Third, it regulates the sale of this defined article.

Fourth, it enforces its provisions by the severest penalties known to our criminal law in the misdemeanor class.

No one could be convicted therefore under this section unless he sold the very article defined. He is not permitted to sell an article provided it contains certain constituent elements, and then punished, if he sold the article without such elements, but the sale of the article is prohibited, if as defined, and he cannot be punished unless the article is the very article defined.

This distinction is of special importance, and specially emphasized by the other provisions of the Act.

The first section of the Act defines ardent spirits, and generally the definition is that any drink which produces intoxication is ardent spirits, and specially as to malt liquor it is "malt liquors containing two and a quarter per cent. alcohol and which produce intoxication." A malt liquor may contain something more than 2¼ per cent. alcohol and yet not produce intoxication or it might contain something less than 2¼ per cent. alcohol and yet produce intoxication. In neither event would it be ardent spirits. The insertion of the 2¼ per cent. alcohol in the definition was evidently to fix the minimum amount of alcohol, below which malt liquor could not be classed as ardent spirits. Malt liquor still retains so much of the general definition, that it must produce intoxication even though it contains more than 2¼ per cent. alcohol in order to be classed as ardent spirits. One of the constituent elements in the definition of Malt Beverage is that it shall contain not in excess of 2¼ per cent. alcohol and be nonintoxicating. It may contain 2¼ per cent. alcohol therefore, and a malt liquor, which does contain 2¼ per cent. alcohol may be Malt Beverage or Ardent Spirits according to its intoxicating effect.

The fact that Malt Liquor, containing 2¼ per cent. alcohol, cannot be classed either as ardent spirits or malt beverage, for the illegal traffic in which distinct punishments are prescribed, emphasizes the other distinguishing constituent elements in the definition of each. The punishment for illegal traffic in ardent spirits is far less severe than the punishment for illegal traffic in

Malt Beverage, while as above pointed out there undoubtedly is a large class of Malt Liquor, which is neither ardent spirits nor Malt Beverage. The statute does not in any way regulate or control traffic in such. If Malt Liquor is intoxicating, its traffic cannot be regulated under the section relating to Malt Beverage, but if it contains more than 2¼ per cent. alcohol, it is regulated under the sections having reference to ardent spirits, and if it does not contain 2¼ per cent. alcohol, there is no law regulating its sale, for such Malt Liquor is not ardent spirits because it contains less than 2¼ alcohol, and it is not Malt Beverage because intoxicating. If Malt Liquor contains something more than 2¼ per cent. alcohol but is not intoxicating, its sale on the market is as free as any other article of food or commerce.

AN ANALYSIS OF THIS SECTION 23½.

Bearing in mind, that the section is undertaking to prohibit or severely regulate the traffic in a defined article of food or commerce, it becomes important to investigate closely the definition and regulations prescribed. The definition given in the section is as follows: "That Malt Beverage within the meaning of this section shall be construed to be the product of a brewing plant or brewery, and shall as to its composition comply with the standards now or as may hereafter be prescribed by the pure food commissioner of the United States, but shall be nonintoxicating and in no event contain in excess of 2¼ per cent. in volume of alcohol."

First: It must be the product of a brewing plant or brewery. Leaving out of view the indefiniteness of such a description, would the same thing produce at any other place than a brewery answer the definition? If the product of a brewery is to be taken as synonymous with that which is ordinarily produced at a brewery, viz, malt liquor, the awkward expression, being a different term for the same thing used throughout the act, would leave open to contention how far compositions containing admixtures not supplied at a brewery could be called the product of a brewery.

Second: "Shall as to its composition comply with the standards now or as may hereafter be prescribed by the pure food commissioner of the United States." After vainly searching the pure food law of the United States for light, I wrote a letter addressed to the pure food Commissioner of the United States. I received an answer from the Agricultural Department, which informs me that the Agricultural Department "has adopted no standard for malt beverage and the law does not define the product." I may add that there is no officer or agent known to the United States law as the pure food Commissioner. These

facts the Court will take judicial cognizance of, especially in view of the fact that the law refers the Court to such a source for information. How is the Court to discover the composition of an article, when the source to which it is referred has no existence. It impresses me that this alone would render the law wholly unmeaning. But if there was a source which furnished the composition of Malt Beverage, any composition which departed from the standard instead of making the offender guilty would relieve him of the offence. He would not be selling Malt Beverage.

Third: "Shall be nonintoxicating and in no event contain in excess of 2¼ per cent. in volume of Alcohol."

a. I do not know whether any difference is intended in the use of the words "in volume" found in the definition of Malt Beverage, and which are wanting in the definition of ardent spirits.

b. I have pointed out the fact that Malt Beverage and ardent spirits may each have the same per cent. of alcohol. I do not think it necessary to discuss that feature further.

c. In no respect can Malt Beverage be treated as an intoxicating drink.

1. Its definition excludes such classification.

2. It has no defined territory for its traffic. The law is alike applicable to wet and dry territory.

3. Minors, lunatics, drunkards, may all be its patrons.

4. Licensed dealers in intoxicants cannot sell it.

The analysis of the definition of Malt Beverage leads to the conclusion that it is the product of a brewery, nonintoxicating, which may contain as much as 2¼ per cent. in volume of alcohol, of a composition incapable of being ascertained until the United States appoints a pure food Commissioner with power to define it, and which in every essential particular may closely resemble a multitude of other articles of food or commerce upon the market.

THE REGULATIONS GOVERNING ITS SALE.

The regulations governing the traffic in Malt Beverage are as follows:

First: Only a person who has a license as a Malt Liquor Manufacturer can either manufacture or sell it. As only such licenses can be granted in the city or county in which the business is to be conducted, only the Malt Liquor Manufacturers of this State can engage in this traffic. Such a manufacturer may appoint his agents anywhere in the State. The licensed liquor dealer, who should substitute this nonintoxicating drink for the intoxicating liquor it is his privilege to deal in, would incur the heavy penalty of this law unless he should act as the agent of some brewer of this State in selling the liquor made in this State. A reputable druggist undertaking to sell upon the prescription of a reputable

physician the same article made out of this State, would incur the penalty of this law. Any agent of a State brewer, however disreputable, may sell his brew.

Second: It must be sold direct to the consumer. A consumer is supposed to be one who destroys the article in its use. How any one is to know that the person to whom he sells intends to destroy the same in its use, especially as the liquor cannot be drunk where sold, is not explained, but is not involved directly in the matter now under consideration.

Third: "And in quantities of not less than one half dozen nor more than four dozen bottles at one time." It can only be sold in bottles of a particular type. No dimensions are fixed for the bottles. It can be sold by the half dozen bottles if they contain only half pint each but three pint bottles cannot be sold. Four dozen quart or gallon bottles may be sold but 49 half pint bottles cannot be sold. It cannot be sold in a jug or any other vessel, though every other requirement is strictly observed. It must be a vessel with a neck to it. The bottles need not be of the same dimensions. Thus one pint bottle and one quart bottle, and four half pint bottles can be sold, but two pint bottles and one quart bottle and two half pint bottles cannot be sold. The quantity of bottles and not the quantity of liquor is the arbitrary limitation of this law. Thus petitioner has been fined five hundred dollars, the minimum punishment imposed by this law for selling two bottles of a nonintoxicating liquor without any reference to the quantity of liquor sold. He might have placed exactly the same liquor in a half a dozen bottles and he could not have been punished on the charge preferred against him.

Fourth: The punishment imposed by this law is the severest in the misdemeanor class. Had petitioner been convicted of selling two bottles of whiskey, the punishment would have ranged from a fifty dollar fine to sixty days in jail and one hundred dollar fine. The punishment under this law ranges from a fine of $500 to a fine of one thousand dollars and twelve months in jail. Upon what principle a person is so much more severely punished for selling a nonintoxicating liquor than for selling an intoxicating one it is difficult to explain. Into an act designed by pains and penalties to suppress the evils of the intoxicating liquor traffic is injected a section which makes the sale of a purely nonintoxicating drink by far the more serious crime. It would seem that the limit to public necessity would have been reached if it were classed as ardent spirits, and the suspicion may be naturally excited that it is the invasion of the privileges supposed to be granted to the few brewers of the State that is so severely dealt with.

THE LAW APPLICABLE.

I consider the law unintelligible. It is impossible for a citizen to read the law and to know what he is forbidden to sell. But if we take the attempt for the deed and take for granted that the section defines a pure and harmless, nonintoxicating drink, then I consider the statute unconstitutional.

The police power of the legislature to enact laws for the public good and general welfare, for the protection of the health and morality of the community, is and ought to be very broad and great. The individual citizen however has certain rights which cannot be invaded. As was said by Justice Harlan in Mugler *v.* Kansas, 123 U. S. 659, 661, 31 L. Ed. 209:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, the Courts must obey the Constitution rather than the lawmaking department of government, and must, upon their own responsibility, determine whether, in any particular case these limits have been passed."

As was said by our own Supreme Court of Appeals in Young's Case. 101 Va. 863, 45 S. E. 327:

"The liberty mentioned is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purpose above mentioned. These are individual rights, formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which begins with fundamental propositions, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."

And as was said in a later portion of this opinion, citing from the Supreme Court of the United States, "to justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference, and, second that the means are reasonably necessary for the accomplishment of a purpose not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations."

The innocuousness of Malt Beverage is attested throughout the section. The definition shows that it must be nonintoxicating and harmless and the other provisions are in harmony with this conception. If only it be the product of a home brewer, it may be sold to man, woman or child on any day and in any place, but nobody but the brewer may sell it. The harmfulness of the traffic is not, therefore, inherent in the article.

I do not call in question the power of the Legislature to pass any law regulating the traffic in intoxicating liquor. It is inherently a traffic which calls for the full police power of the Legislature to regulate. But by its very definition Malt Beverage is not an intoxicating liquor. A regulation on this subject must have some relation to the object had in view looking to the control of the intoxicating liquor traffic. Thus, in case of State *v.* Gilman, 33 W. Va. 146, 10 S. E. 283, Judge Snyder pronounced a statute unconstitutional which made the mere possession of intoxicating liquor for another a criminal offence.

I do not call in question the right of the Legislature to class as intoxicating any liquor which may be intoxicating in any of its forms. Thus, in Massachusetts a statute classing cider as an intoxicating drink has been upheld. In Alabama a statute classed all malt liquor as an intoxicating liquor. Its constitutionality was assailed but was upheld. The Court said in effect that while some malt liquor was not intoxicating, and beneficial, yet the gradation of the harmless to the harmful was so imperceptible that the Commonwealth could not be required to separate the good from the bad. Freebling *v.* State, 130 Ala. —.

But this section does not classify all malt liquor as intoxicating drink. It does separate the good from the bad. It selects out of various forms of Malt Liquor the most harmless of all, and makes traffic in it a severely penal offence, and entirely distinct from traffic in intoxicating drink. In a prosecution under this act it would be incumbent upon the Commonwealth to prove that the person charged sold an innocent and harmless drink, for which it would impose severe penalties. It is a mooted question whether or not the Legislature has the power to classify any drink, which under none of its forms can be intoxicating, as intoxicating drink. The very definition of this drink excludes the idea that it can be intoxicating. The moment it is shown that it is intoxicating, that moment the prosecution under this act falls to the ground. But as has been said before, there is no attempt to classify this drink as intoxicating and cases on this point are not applicable.

I do not call in question the power of the Legislature to pass laws to prevent public imposition by spurious articles of commerce intended and manufactured to simulate the genuine. Thus in this State and many others there is legislation directed at the

traffic in oleomargerine. These statutes have generally been upheld. But no statute has ever been upheld that only farmers may manufacture and sell butter because oleomargerine may be mistaken for it. The section does not purport nor can be classed within statutes of such description.

The most that can be claimed for this section is that sales of Malt Beverage may be used as a cloak for the sale of ardent spirits, and that therefore the regulations controlling its traffic are within the discretion of the Legislature. This view, however, is opposed to the whole framework of the section.

First: Again it is necessary to call attention to the fact, that Malt Beverage is not classed as ardent spirits, if the regulations are not observed. If the Legislature feared that this article would be used as a cloak for the use of ardent spirits, the utmost extent of legislative power over an inherently harmless article would be to classify it as ardent spirits.

Second: As pointed out from the definition Malt Beverage is only one form of many varieties of Malt Liquor. The other varieties which are not ardent spirits could be used as readily, if not more so, as a cloak for the illegal traffic of ardent spirits. Thus a shade more per cent. alcohol than 2¼ per cent. alcohol, and the protection against the ardent spirits cloak is gone.

Third: All regulations should reasonably further the object had in view. Petitioner stands charged with selling two bottles of this article. He is not charged with selling in bottles not according to the regulations, but he has been fined and under the warrant can only be punished for selling two bottles of unfixed dimensions. If the object is simply to prevent the article from being used as a cloak, there seems to be no relation between this regulation and the end had in view.

Fourth: The manufacture and sale of this article is confided exclusively to manufactures of intoxicating liquors. If feared as a cloak for the sale of ardent spirits it is hard to conceive how it could be intrusted to more dangerous hands. If it could be manufactured at a place where it alone was permitted to manufactured and sold only by such manufacturer, there might be some claim that such a regulation would be a protection.

Fifth: It is applicable to license territory in which ardent spirits may be freely bought.

I think the fatal defect to this section is the way in which it is constructed. If the Legislature desires to regulate and control the traffic in Malt Liquor or any other liquor, which may be intoxicating, I have not a doubt in my own mind, under the great weight of authority, it has the power to do so. But here it has selected a particular type of malt product, which it has most imperfectly defined, and which is of the type of nonintoxicating

liquor. Its power over this particular type, to which it has narrowed itself, must be restricted, because it is dealing with a traffic which it has said shall be harmless. Perhaps the framer of this section conceived, that the other sections inhibited or controlled the traffic in all Malt Liquor. If so, as we have seen a mistake was made. The section first requires the Malt Liquor to be pure and harmless before its legislation attaches to it.

I do not believe the law, as drawn could be utilized to prevent Malt Liquor of a great variety of types from being freely used for illegal purposes by evilly disposed and undersirable citizens, if Malt Beverage can. Indeed, as pointed out, inasmuch as an important feature of the definition is unmeaning under the law as it now stands, I doubt exceedingly if the whole section is not fatally defective on that ground alone.

I regard the legislation as bearing upon a particular, defined type of harmless Malt product, which must be construed in relation to legislative treatment accorded other forms of Malt Liquor.

So viewed I regard the prohibition and regulation imposed upon this particular type and brand to the last degree oppressive and unreasonable, and that therefore the law is unconstitutional.

I do not intend, however, by the use of the habeas corpus writ to obtrude these views on Judges fully as capable to form just and proper conclusions. For reasons given, I have granted the writ in this particular instance and those reasons end with this application.

Note.

A petition for writ of error has been granted in behalf of the Commonwealth.